IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 467 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ARVINDBHAI DAHYABHAI PATEL AND ANOTHER
Versus
KRISHNAKANT J SHAH

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Appearance :
MR AJ PATEL with MR AB MUNSHI for Appellants.
MR SM SHAH with MR PARTHIV B SHAH for Respondent.

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 28/12/2006

ORAL JUDGMENT

1) By filing this appeal from Order, the appellants have challenged the order passed by learned Civil Judge (S.D.), Baroda, below Exh.5 in Special Civil Suit No.249/2003 by which the learned Judge has partly allowed interim injunction application filed by respondent – original plaintiff by granting order of status-quo in connection with one of the

disputed lands being Survey No.384.

2) The respondent herein is the original plaintiff of aforesaid suit. Said suit has been filed by the plaintiff for specific performance of the suit agreement as well as for permanent injunction. It is the case of the plaintiff that the plaintiff is doing building construction and land development business in the city of Baroda and that defendant no.1 approached the plaintiff for the purpose of developing his land, which is described in paragraph 1 of the plaint. It is the case of the plaintiff that defendants have agreed to give development contract to the plaintiff for developing the lands in question being Survey Nos.380, 382, 388/1/A, 388 (3), 384 and 370. As per the averments made in the plaint, the plaintiff and defendants agreed to form a partnership for the purpose of developing said lands and it was agreed that the plaintiff and defendants will have 50% share respectively in the profit or loss of the business and expenditure for such development was to be borne by the plaintiff. It is also the case of the plaintiff that the parties have orally agreed about certain conditions on 14-9-1999 and on that basis defendants no.1 and 2 also executed writing on 14-9-1999. It is also the case of the plaintiff that the plaintiff had paid Rs.1 Lac towards sell consideration to defendants and the defendants are bound to act as per the development agreement. Thereafter, they started developing Survey No.384 and the scheme for such development was also inaugurated and at that time, it was agreed to develop simultaneously Survey No.380 (1) A, which is in final plot no.91 as well as revenue Survey No.388 (3) in Final Plot No.93. It is further averred in the plaint that the plaintiff had also incurred certain expenditure in connection with preparing plans and getting the same approved from the Corporation. At that time, someone had objected about opening of approach road for which the plaintiff had agreed to settle the dispute with said person but defendant did not gave

cooperation for settling said issue and instead filed a Civil Suit No.212/2001 against aforesaid person and said objector also filed Civil Suit No.224/2001 before Civil Court at Vadodara. It is also averred in the plaint that subsequently, the defendants tried to back out from the agreement and informed the plaintiff that they are not willing to get said land developed with the help of the plaintiff. The plaintiff was shocked by aforesaid conduct of the defendants and ultimately, it was agreed to pay Rs.90 Lacs to plaintiff towards his initial investment as well as towards expenditure, which he has incurred and on receiving such amount, the plaintiff had agreed to cancel the relevant agreement and to hand over all necessary papers to defendants. It is also the case of plaintiff that defendants gave him post dated cheque on 9-4-2003 but on presentation said cheque bounced back. Therefore, aforesaid suit is filed by the plaintiff for getting a decree for specific performance in connection with property described in paragraph 1 of the plaint being Survey No. 380, 382, 388 (1) A, 388 (3), 384 and 370 and directing defendants to execute the sale deed in connection with said property. It is alternatively prayed that a decree for Rs.1 Crore and 50 Lacs may be passed towards damages against the defendants and the plaintiff has also prayed for permanent injunction in connection with aforesaid property.

3) Aforesaid suit is resisted by defendants on various grounds. It is contended on behalf of the defendants that the defendants had agreed to develop the land bearing Survey No.384 and an agreement was executed on 14-9-1999 in that behalf, however, no agreement had taken place regarding rest of the lands. It is also stated by the defendants that the plaintiff has committed forgery by inserting other survey numbers in the said agreement. It is the say of the defendants that the plaintiff has created bogus documents behind the back of the defendants. The defendants also denied that they had issued a cheque for Rs.90 Lacs. It is

the case of the defendants that the plaintiff has filed the suit only in order to extort money from the defendants. It is the say of the defendants that the plaintiff has not approached the Court with clean hands and, therefore, no relief can be given to such plaintiff. On this and other grounds, suit is resisted by the defendants.

4) In the aforesaid suit, respondent – original plaintiff gave an application at Exh.5 under Order 39 of Civil Procedure Code for getting interim injunction with a prayer that during the pendency of the suit, defendants may be restrained from changing status-quo in connection with suit property and defendants may be restrained from handing over the possession of the suit land to any third party.

5) Learned trial Judge initially passed an ad-interim order in connection with lands in question, however, after hearing both the sides by his judgement and order dated 11th September, 2003, learned trial Judge vacated interim order of status-quo in connection with other lands and granted status-quo only in connection with Survey No.384.

6) Having been dissatisfied with aforesaid order of granting status-quo in connection with Survey No.384, original defendants have filed this Appeal from Order by resorting to Order 43 of the Civil Procedure Code.

7) On behalf of the appellants, learned advocate Mr.A.J.Patel, vehemently submitted that, when prima facie it is established that the plaintiff has committed forgery, interim injunction should not have been granted to assist such plaintiff. It is submitted by Mr.Patel that no decree for specific performance can be granted in connection with development agreement, which is in connection with developing the land in question.

Mr.Patel also submitted that though the plaintiff is a building contractor and doing business of developing the land, he has acted in a fraudulent manner and only in order to extort money, such suit is filed. It is argued by Mr.Patel that originally the parties have decided to form a partnership for developing land bearing Survey No.384 and, subsequently, the plaintiff added certain other survey numbers in the agreement and on that basis the suit is filed and interim injunction was sought in connection with that land. Mr.Patel further submitted that an agreement for forming partnership cannot be specifically performed and, therefore, suit in this behalf is not maintainable and in that view of the matter, there is no question of granting injunction even in connection with Survey No.384.

8) On behalf of the respondent, learned advocate Mr.S.M.Shah, has submitted that when the defendants-appellants herein have not disputed the fact that an agreement was entered into between the parties in connection with development of land being Survey No.384, at least, status-quo was required to be maintained by the defendants in connection with said survey number and in that view of the matter, the trial Court is justified in granting injunction in connection with aforesaid survey number. It is also submitted by Mr.Shah that against the order of the trial Court by which the trial Court has refused injunction in connection with other survey numbers, the respondent - original plaintiff had preferred an Appeal from Order before this Court being Appeal from Order No.344/2003, however, said Appeal was dismissed by learned Single Judge of this Court and accordingly order of the trial Court was confirmed in aforesaid Appeal from Order. He further submitted that in that view of the matter, present appeal is not maintainable as it is barred by res judicata or the appellants are estopped from challenging the order, which is confirmed by this Court. Mr.Shah further submitted that

in view of the decision of learned Single Judge passed in earlier Appeal from Order, which was preferred by the present respondent, this appeal is not maintainable.

9) I have heard both the learned advocates. I have also gone through documentary evidence, which is made available for the perusal of this Court as well as various judgements cited by both the learned advocates. So far as question about maintainability of this Appeal from Order is concerned, it is no doubt true that against the order of the trial Court refusing interim relief in connection with other survey numbers, the present respondent – original plaintiff had filed Appeal from Order before this Court being Appeal from Order No.344/2003. Said appeal was dealt with by learned Single Judge (Coram : C.K.Buch, J.) and vide his judgement and order dated 8-10-2003 it was summarily dismissed. While dismissing said appeal in limine, learned Single Judge has observed as under :

> "1. Heard ld. counsel Mr.P.B.Shah for the appellant. Today, in compliance with the order passed by this Court, Mr.Shah has brought original writing viz.so-called understanding allegedly executed between the parties qua all the survey numbers referred to in the plaint of Spl.Civil Suit No. 249/2003 including Survey No.384, dated 14.9.1999 (Mark 4/1 = 17/1). On the day of filing of the suit, ex-parte order to maintain status quo was granted qua all the survey numbers mentioned in the document Mark 4/1. Thereafter, the defendants produced the zerox copy of that very docuemnt vide Mark 17/1.
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> 2. Considering the case of the parties on merits, ld. Civil Judge has allowed the application for injunction partly and

defendants have been directed to maintain status quo qua survey no.384 mentioned in the above-said writing relied upon by the plaintiff. Undisputedly, first two lines of the original writing shown today to the Court are missing in the zerox copy given by the other side wherein all survey numbers are mentioned. That for all time right from the date of execution, said writing was with the plaintiff, then how zerox copy could be found in possession of the other side? is the question. The say of the defendants is that the zerox copy of the writing was handed over by the plaintiff on the day of understanding much prior to the present litigation. Missing of 2 lines wherein various survey numbers are referred to including survey no.384, creates doubt as to the genuineness of the reference of other survey numbers except survey no.384 for which the say of the the plaintiff has been accepted and the order of retraint is granted qua that Survey No.384. I have carefully seen and compared original of the document Mark 4/1 - 17/1 with these two. Though it is apparent, but for more satisfaction, magnifying glass is also used for scrutiny.

3. Without evaluating the documents entirely on merits, it is possible to conclude by this Court that there is no element of any error or illegality in the order under challenge and the prima facie strength in the case of the plaintiff. The plaintiff has simultaneously prayed for the decree of Rs.1.50 Crores as damages. The effect of bouncing of the cheque is the aspect on which ld. counsel Mr. Shah has hammered that then for what reason the cheque of such a huge amount was given to the plaintiff is not properly either discussed or decided by the lower Court while evaluating the prima facie case of the plaintiff. I am

told that for bouncing of the cheque of Rs.90 Lakh, a notice to initiate proceedings under the provisions of the Negotiable Instruments Act was served but thereafter the plaintiff has opted not to prosecute the defendants under Sec.138 of the Negotiable Instruments Act.

4. I have gone through the relevant part of the written submissions stating the contingency as to how the cheque bearing a particular number is found with the plaintiff and was tendered for clearance with a view to get Rs.90 Lakh from the Account of the defendants. Even for the sake of arguments it is accepted that a particular cheque was given, then the purpose for which the cheque in question was given or when the same was given to the plaintiff or whether the amount was positively mentioned in the cheque itself when the said cheque was signed, requires to be considered on merits on the strength of the evidence to be led by the parties. The suit for specific performance of a Development Agreement is found maintainable and scope of success would be mainly for damages only.

5. It is pertinent to note that the plaintiff has claimed discretionary relief and when he has supressed material fact, he can not claim equity. Addition of two lines in the so-called writing amounts to suggestio falsi.

6. Considering the nature of averments made in the plaint and relief prayed by the plaintiff in the suit, defendants could not have been directed to maintain status quo qua all the lands when plaintiff has not positively prayed that other survey numbers owned by the defendants be kept under charge for the

amount of Rs.90 Lakh for which cheque was allegedly issued nor attachment upto that amount has been prayed under Order 38 Rule 5 of C.P.Code. There is no perversity or material error either of law or fact found in the impugned well-reasoned order. In short, there is no merit in the say of the appellant and, therefore, the appeal requires to be dismissed and hence AO is dismissed in limine. No costs.

7. Mr.Shah, ld. counsel appearing for the appellant submits that this order may be placed under suspension for some time as the appellant intends to approach higher forum. The Court has recorded finding on merits confirming the finding recorded by the Lower Court and considering the settled legal position in this regard, the request made by ld. counsel Mr.Shah is hereby rejected."

10) Relying upon the aforesaid observations of learned Single Judge of this Court, Mr.S.M.Shah argued that when learned Judge of this Court has found that the order of the trial Court is correct and there is no perversity or material error either of law or of fact, now this appeal challenging the very order of the trial Court is barred by principle of res judicata. In this connection, he has relied upon the decision of Division Bench of this Court in **Darayas Bamanshah Medhora Vs. Nariman Bamansha Medhora** reported in **(2002) 1 GLR 474**. In the aforesaid case, trial Court had decided two cross-suits by a common judgement as both the suits were between the same parties and the relief sought in each of the suits was similar. In the aforesaid case, trial Court, with the consent of the parties, consolidated both the suits and it was ordered that both the suits be tried together and common issues were raised and common evidence was recorded. Considering the aforesaid aspect of the

matter, and considering the judgements of the Honourable Supreme Court on the subject, it has been held by the Division Bench in its judgement in paragraphs 10.4, 11 and 16 as under :

> "10.4 The entire controversy in law as to whether a single appeal would lie from one of the decrees arising from a common judgement has been considered in the various decisions aforesaid, only by testing against and applying the principle of res judicata. In the context of these decisions it is necessary to bear in mind that a reference to the common judgement, and consequently a reference to a supposed judgement resulting in one of the decrees, is only necessary to ascertain whether "the question substantially in issue" was common in both the suits.
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> 11. While considering the aforesaid decisions, which, as aforesaid, have also been considered by the subsequent decisions of the Supreme Court, it also requires to be kept in mind that the principle of res judicata is not the only principle upon which this legal controversy can be reflected upon. Another principle which, in our opinion, would have a bearing on this controversy is the principle of acquiescence and/or estoppel. This principle would also apply to the controversy in issue, inasmuch as it could be urged that when only one decree is challenged in the singular appeal, the other decree which is not the subject matter in appeal, is a decree which is acquiesced to. Ultimately it makes no difference whether the same set of reasons and the same set of findings justify both the decrees. This may perhaps appear to be similar to calling a glass half full or also calling it half empty. It may be that such a description carries different

concepts, although the factual result is the same. The distinction in law lies in the real and substantive distinction between an appeal from a judgement and an appeal from a decree. Once this distinction is established and kept in mind, it becomes a simpler exercise to appreciate the view expressed by the Supreme Court in the decisions hereinafter discussed.

16. A reference was also made to the decision of the Supreme Court in the case of Managing Director Vs. K. Ramachandra Naidu, reported in AIR 1995 SC 316. In our opinion, this decision would not have any application to the facts inasmuch as the question before the Supreme Court was on the facts where both the parties had filed separate appeals from a common judgement in a writ petition, on which facts it was found that the dismissal of the appeal filed by one party on the ground of limitation, would not adversely affect the appeal filed by the other party which was within limitation. Obviously the case before the Supreme Court was on consideration of two appeals filed by two separate parties arising from the same judgement. Here the case is entirely different, where the appellant, though adversely affected by both the decrees, has chosen to challenge only one of them."

11) However, so far as present case is concerned, it is in connection with interim application under Order 39 of Civil Procedure Code which is partly allowed by the trial Court and being aggrieved by said order, original plaintiff as well as the original defendants have filed two separate Appeals under Order 43 of Civil Procedure Code. It is not in dispute that the appeal filed by present appellants – original defendants is filed within the period of limitation. Since the plaintiff and defendants

both were aggrieved by the order of the trial Court, dismissal of appeal filed by the present respondent cannot come in the way of present appellants while challenging the order of the trial Court, as part of it is against the present appellants. This appeal is filed by a separate party and not by the same party, who has filed earlier appeal. In that view of the matter, it cannot be said that the present appeal is not maintainable in view of the dismissal of the appeal filed by present respondent. While examining the appeal filed by present respondent, this Court was concerned with merits of the case of present respondent only and the case of the present appellants was never under consideration before this Court. This Court had not examined the merits of the order of the trial Court in connection with Survey No.384 and as pointed out earlier, both these appeals have been filed by separate parties and not by the same party, therefore, it cannot be said that this appeal is barred by res judicata. In a given case, question of res judicata may arise if the same party again files an appeal against a common order. Simply because the appeal of the present respondent was dismissed by this Court, can never be a ground for throwing away the appeal of the present appellants, as the grievance of the present appellants was never under consideration before this Court nor the case of the present appellants was considered on merits so far as granting injunction in connection with Survey No.384 is concerned. Therefore, in my view, rights of the present appellants cannot be said to be taken away in view of the dismissal of the appeal filed by the present respondent. Similarly, when the same party has not challenged the order again, there is no question of estopple as the present appellants had never preferred any appeal before this Court and as pointed out earlier, this appeal is filed within the period of limitation.

12) At this stage, reference is required to be made to the decision of the Honourable Supreme Court in **Managing Director Vs. K.**

Ramachandra Naidu and Another, reported in **AIR 1995 SC 316**. In the aforesaid case, the Apex Court has observed as under in paragraphs 6 and 7 :

> "6. In the present case the factual and legal situation is entirely different. The State as well as the appellant were respondents in one and the same writ petition, against the decision of which they had filed separate appeals. The dismissal of the writ appeal filed by the State on the ground of delay not being condoned could not in law affect the maintainability of the writ appeal which had been filed by the appellant within time and was pending final hearing in the High Court. The order in the writ petition could have been challenged by one appeal only unlike in Sheodan Singh's case where four appeals were required to be filed in law against the four decrees even though deciding the common issue relating to title. We cannot, therefore, subscribe to the view of the High Court that the dismissal of State's appeal, in the facts and circumstances of the case could operate as res judicata and bar the maintainability of the appeal filed by the appellant.
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> 7. In Narhari v. Shanker, AIR 1953 SC 419, on the suit of the plaintiff being decreed in the Trial Court, two separate appeals were taken by two set of defendants. The Appellate Court allowed both the appeals and dismissed the plaintiff's suit by one judgment and ordered a copy of the judgment to be placed on the file of the connected appeal. The plaintiffs preferred two separate appeals. One of the appeal was held time barred and invoking the principle of res judicata the High Court dismissed the other appeal also Reversing the decision of the High Court, this Court observed (at p.420) :

> "The question of res judicata arises only when there are two suits. Even when there are two suits, it has been held that a decision given simultaneously cannot be a decision in the former suit. When there is only one suit, the question of res judicata does not arise, at all and in the present case, both the decrees are in the same case and based on the same judgment, and the matter decided concerns the entire suit. As such, there is no question of the application of the principle of res judicata. The same judgment cannot remain effective just because it was appealed against with a different number or a copy of it was attached to a different appeal. The two decrees in substance are one."

13) As pointed out earlier, so far as present appeal is concerned, it is filed by the appellants having been aggrieved by part of the order of the trial Court and since the case of the present appellants was never under consideration before this Court while dismissing earlier appeal filed by the respondent, it cannot be said that the present Appeal is barred by res judicata or by estopple.

14) So far as merits of the present appeal is concerned, it is required to be noted that as per the averments made in the plaint, the plaintiff has prayed for specific performance of development agreement as well as regarding agreement to form a partnership, prima facie, such suit is not maintainable, as such agreement cannot be specifically enforced and, therefore, proper remedy available to the plaintiff is to get damages, in case the plaintiff is able to prove his case. As per the say of the plaintiff, it was decided to put an end to the suit agreement by payment of certain amount for which cheque was issued by the defendants, in that view of the matter, the plaintiff has also prayed for a money decree. Under these

circumstances, the trial Court was not justified in granting injunction in connection with Survey No.384.

15) Even otherwise, when, prima facie, it is found that the plaintiff has interpolated the document, no discretionary relief can be granted in favour of such a plaintiff. While granting injunction under Order 39 of Civil Procedure Code, the Court is required to see the conduct of the parties and the plaintiff, who is found to have committed forgery as well as purgery, cannot get any assistance from the Court in the matter of getting discretionary order. Not only that the trial Court has found that the plaintiff has tempered with the document and even though the agreement was in connection with development of Survey No.384 only, subsequently, certain other survey numbers were added by the plaintiff fraudulently. In my view, when the trial Court has found, prima facie, that the plaintiff has committed forgery, the trial Court should have rejected the injunction application in toto instead of granting status-quo in connection with Survey No.384. As per the say of the plaintiff, for putting an end to the so-called development agreement, defendants had agreed to pay Rs.90 Lacs for which a cheque was given, however, the defendant has denied issuance of any such cheque. If the defendant had issued any cheque and if it had bounced, after giving notice the plaintiff has not taken any steps to file criminal proceedings in connection with bouncing of cheque.

16) The plaintiff can pursue remedy for recovering the amount, and for that purpose status quo is not required to be granted even with regard to Survey No.384, as if any charge is created in favour of the plaintiff regarding that land. If the plaintiff succeeds in the suit, he can get money decree for damages and he can execute such decree against the defendants. In any case, as per the finding of the trial Court the

plaintiff has subsequently added certain survey numbers in the agreement and when the trial Court, itself, has found in its judgement that in view of the decision of the Supreme Court in case of Her Highness Mahrani Shantadevi Vs. Shavjibhai Haribhai Patel & Ors., reported in 42 GLR (3) 2097, so far as agreement in question is concerned, it cannot be specifically performed, the trial Court has committed an error of law while partly allowing injunction application. As noted earlier, the remedy available to the plaintiff is to get the damages if he is able to prove his case but there is no question of granting status-quo even with regard to Survey No.384, as at the time of deciding an application under Order 39 of Civil Procedure Code, the Court is also required to see the conduct of the parties. The plaintiff has sought relief under Order 39 of Civil Procedure Code, which is highly discretionary in nature and the plaintiff is required to come before the Court with clean hands, which aspect is admittedly missing in the present case. In my view, when the trial Court, itself, has found that the plaintiff has committed forgery of a document, the trial Court should not have partly allowed the injunction application of the plaintiff. It is no doubt true that normally discretionary order passed by the trial Court under Order 39 of the Civil Procedure Code should not be disturbed by this Court under Order 43 of the Civil Procedure Court unless it is found that such order is contrary to law or the trial Court has not considered various aspects involved in the matter. In the instant case, trial Court has not considered various aspects, which are discussed earlier in this judgement and when the trial Court has found that plaintiff has added more survey numbers in the original agreement, on that ground itself, the trial Court should have refused injunction in favour of the plaintiff.

17) Considering the aforesaid aspect of the matter, order of the trial Court granting status quo with regard to Survey No.384 is required to be

set aside and the same set aside. Accordingly, this Appeal from Order is allowed with no order as to costs. Injunction application filed by the original plaintiff in Special Civil Suit No.249/2003 stands dismissed. It is clarified that the observations made by this Court should be treated to be tentative in nature and the same should not be taken into consideration while deciding the suit, as the suit will have to be decided on its own merits and as per the evidence led by the parties.

18) At this stage, learned advocate Mr. Shah submitted that his client would like to go to the Supreme Court against this order and, therefore, this order may be stayed for some time. This request of Mr Shah is objected by Mr.Munshi on the ground that the plaintiff, who is a building contractor has created forged document and, therefore, order may not be stayed. However, in my view, since this Court has vacated interim injunction granted by the trial Court, prayer of Mr.Shah to stay the order is granted and this order shall remain stayed till 20-1-2007.

(P.B.Majmudar, J.)

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